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7 BEFORE THE INSURANCE COMMISSIONER
8 OF THE STATE OF WASHINGTON

9
10 In the Matter of the Application
11 regarding the Conversion and
12 Acquisition of Control of Premera Blue
13 Cross and its Affiliates.

No. G 02-45

PREMERA'S RESPONSE TO
INTERVENORS' MOTION FOR
EMERGENCY HEARING

14 INTRODUCTION

15 In anticipation of a possible motion by Premera, the Intervenor filed a "motion for
16 emergency hearing." The Intervenor's motion combines baseless innuendo with
17 procedural claims that are utterly without merit. There has been no impropriety by either
18 the OIC Staff or Premera. Contrary to the Intervenor's assertions, the Commissioner has
19 full authority to permit Premera to consider and respond to the concerns and suggestions
20 of the OIC Staff's consultants. Granting Premera's pending motion will ensure that the
21 Commissioner has the benefit of full information and, at the same time, enhance public
22 understanding and involvement in this process.

23 The Intervenor's implication that Premera and the OIC Staff may not talk to each
24 other is absurd. The Commissioner is the decision-maker with respect to Premera's Form
25 A. As such, the Commissioner is shielded from ex parte communications with the parties

PREMERA'S RESPONSE TO INTERVENORS'
MOTION FOR EMERGENCY HEARING - 1

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1 on questions of substance. As the Commissioner confirmed at the hearing on October 22,
2 2003, there is no such limit on contact between parties. Nothing that the parties discuss
3 can limit the Commissioner's role in this proceeding. Neither Premera nor the OIC Staff
4 would presume to suggest otherwise.

5 The Intervenors note that October 15 has passed, implying that the Commissioner
6 lacks authority to amend the case schedule that he established three months ago to permit
7 amendments to the Form A. There is no basis for such a claim, as the Commissioner has
8 recognized in prior decisions modifying deadlines in this proceeding. Equally without
9 merit is the Intervenors' suggestion that Premera must withdraw its application and
10 undertake an entirely new review process. Amendments to Form A statements are firmly
11 established in practice and authorized under the OIC's rules. Under Premera's proposal,
12 moreover, the time allocated for review of and decision on any amended application far
13 exceeds the 60 days allowed by statute for a decision on a new Form A.

14 Although the Intervenors suggest that they or the public could be deprived of
15 information or the ability to provide input, that concern is fully addressed by Premera's
16 proposal. Any amendment to the Form A must be submitted by January 8, 2004.
17 Consistent with the Commissioner's prior directive, any such amendment would be posted
18 on the OIC website. The public would also have access to all supplemental expert reports
19 that may be submitted on any Form A changes. The Commissioner has indicated that
20 members of the public may offer comments throughout this proceeding. Hence, granting
21 Premera's motion to extend the case schedule would give the public an additional two
22 months to make such comments.

23 The Intervenors' attempt to block Premera from filing an amendment to its Form
24 A is a thinly veiled effort to force Premera to go to hearing without an opportunity to
25 address the substantive issues raised by the OIC Staff's consultants. Alternatively, the

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1 Intervenor seek to restart the entire conversion review process. Both options are
2 unwarranted under the law; both would serve to frustrate the review process now
3 underway. Premera therefore asks the Commissioner to grant Premera's Motion to
4 Extend Case Schedule and to reject the Intervenor's motion.

5 ARGUMENT

- 6 1. There is no legal authority to suggest that discussions between the OIC Staff and
7 Premera are prohibited.

8 Plainly, the OIC Staff and the OIC Staff's consultants may engage in substantive
9 discussions with Premera. The Commissioner's First Order: Case Management Order
10 forbade ex parte communication with the Commissioner, as the presiding officer, and
11 those whom he has designated as his assistants in that function. There is no such
12 prohibition of communication between the OIC Staff and Premera, both of which are
13 "parties" to the proceeding. In an adversary system, and in an administrative hearing, the
14 parties are free to meet with each other and discuss anything that they choose. Nothing
15 that they might discuss, however, is binding upon the decision-maker.

16 As the Commissioner knows—indeed, as was contemplated by the review process
17 that he established—the OIC Staff and consultants met over a period of many months with
18 Premera to obtain requested information and to discuss various aspects of Premera's
19 proposal.¹ The Commissioner also permitted the Intervenor's counsel to speak with the
20 OIC Staff's consultants. Premera believes that the Intervenor and the OIC Staff have had

21 ¹ The Intervenor fault Premera for not having amended its proposal earlier to take
22 account of issues that were identified by the States' consultants in February. Motion at 5.
23 The Intervenor fail to point out that those issues were only a preliminary and partial list
24 of suggestions. Premera wanted to have the consultants finish their analysis before
25 engaging in any negotiations. The Intervenor also neglect to note that further analysis by
the OIC Staff's consultants cast serious doubt on the wisdom of at least one such
suggested change: the creation of two Foundation Shareholders, rather than one. Finally,
the Intervenor omit the key fact that Premera has been seeking to engage in substantive
discussions for the past three months. See Declaration of John P. Domeika (October 22,
2003) (attached).

1 discussions about their respective opinions and recommendations. Premera has no
2 problem with this. The Commissioner addressed the issue of discussions between the OIC
3 Staff and other parties at the hearing on October 22, 2003. There, the Commissioner
4 stated that there is no prohibition upon the ability of the OIC Staff to discuss the substance
5 of Premera's Form A Statement with Premera.

6 Our society is based on a belief that truth arises from the marketplace of ideas and
7 opinions. If the Intervenors have good ideas that they discuss with the OIC Staff, and the
8 OIC Staff is persuaded of the merits of the Intervenors' opinions, is this a bad thing? We
9 think not, particularly when the Commissioner is in no way bound by whatever
10 commonality of opinion there may be between the Intervenors and the OIC Staff. They
11 can agree all they want, but, in the end, they must persuade the Commissioner of the
12 correctness of their views. So, too, any discussions that may take place between the OIC
13 Staff and Premera are only discussions. The Commissioner is free to accept or reject any
14 outcomes of those discussions.

15 2. The Commissioner has the authority to modify the case schedule, subject to the
16 approval of the Thurston County Superior Court.

17 The very rule that authorizes the Commissioner to enter an order after a prehearing
18 conference provides that such an order "shall control the subsequent course of the
19 proceeding *unless modified for good cause by subsequent order.*" WAC 10-08-130(3)
20 (emphasis added). There have been numerous examples of such modifications in this
21 matter, including those done at the request of the Intervenors.² Similarly, WAC 10-08-
22 090(1) provides as follows:

23 _____
24 ² In addition, the Commissioner has sua sponte limited the time allowed for Premera to
25 make and respond to motions and, at the Intervenors' request, extended the time in which
they could submit their reply to one such response.

1 Postponements, continuances, extensions of time, and adjournments may
2 be ordered by the presiding officer on his or her own motion or may be
3 granted on timely request of any party, with notice to all other parties, if
4 the party shows good cause.

5 Pursuant to this authority, Premera has filed a motion to extend the case schedule,
6 conditioned upon adoption of and adherence to a revised schedule as set forth in the
7 proposed order. The OIC Staff agrees with the appropriateness of Premera's request and
8 proposed order; it has stated that it believes Premera's request would serve the salutary
9 purpose of potentially narrowing the issues in dispute between Premera and the OIC Staff.
10 There can be little doubt that discussions designed to identify solutions to the concerns
11 expressed by the OIC Staff's consultants could narrow the issues at the hearing to those
12 that truly divide the parties.

13 Such discussions would continue those already begun. Many months ago, the OIC
14 Staff undertook to study Premera's proposal, to engage in an examination of Premera
15 (which, by its terms, contemplates extensive exchanges between the OIC Staff and
16 Premera), and to make a recommendation at the Form A hearing. As contemplated, there
17 have been extensive procedural and substantive discussions throughout the process. Such
18 contact is in no way improper, as the Commissioner affirmed at the hearing on October
19 22, 2003. The reports prepared by the OIC Staff's consultants were not supposed to
20 identify faults with the Form A that could not be cured. They were, instead, designed to
21 assure that the Commissioner was advised of all of issues raised by the Form A. It is
22 absurd to argue that Premera cannot discuss with OIC Staff the substance of those reports,
23 with a view to finding solutions to address the consultants' concerns.

24 There is but one constraint upon the authority of the Commissioner to modify
25 deadlines or otherwise determine the case schedule in this case: the order of the Thurston
County Superior Court establishing a deadline for the decision upon Premera's Form A

1 Statement. Any proposed extension by the Commissioner of that decision date must be
2 conditioned upon the entry of a stipulated modification of the Stipulation of Parties and
3 Final Order entered by Judge Casey on September 12, 2003. Premera's motion
4 contemplates such a modification.³

5 3. The Intervenors' preference that Premera file a new Form A rather than amend the
6 pending one is peculiar but in any event without force.

7 The Intervenors state that nothing in the Holding Company Acts "explicitly
8 permits a company to re-file, amend, revise or supplement a Form A filing" Motion,
9 at 6. More to the point, nothing in the Holding Company Acts limits Form A
10 amendments. The rules adopted by this agency specifically contemplate them.

11 WAC 284-18-370, entitled "Amendments to Form A," provides as follows:

12 The applicant shall promptly advise the commissioner of any changes in
13 the information so furnished on Form A arising subsequent to the date
upon which such information was furnished but prior to the
commissioner's disposition of the application.

14 Similarly, WAC 284-18A-360, entitled "Amendments to Form A," provides as follows:

15 The applicant shall promptly advise the commissioner of any changes in
16 the information so furnished on Form A arising after the date upon which
the information was provided but prior to the commissioner's disposition
of the application.

17 Despite this clear authority, the Intervenors ask the Commissioner to rule that "[i]f
18 Premera proposes, requests or agrees to substantive changes, revisions, amendments,
19 supplements or conditions to the proposed conversion transaction, the proposed changes
20 will not be considered unless Premera withdraws its pending Form A filing and submits a
21 new revised Form A filing" Motion at 7. There is no authority for such a request.
22 Intervenors would have Premera and the OIC Staff squander more than 14 months of
23

24 ³ Premera does not propose to open up the case schedule anew. On the contrary,
25 Premera's motion is conditioned upon leaving the case schedule unchanged except as
specifically set forth in the proposed order.

1 effort and the many millions of dollars spent on the OIC Staff's consultants. This betrays
2 the Intervenor's true motivation, which is to derail the OIC's conversion review process
3 rather than assist the Commissioner by providing their distinctive views on Premera's
4 proposal. The Intervenor's proposal is also pointless. Were Premera to submit a new
5 Form A application on January 8, 2004, the Holding Company Acts would require a
6 decision on that application within 60 days, which is *before* the current deadline of March
7 15, 2004. Premera's pending motion, by contrast, would *extend* the current schedule for
8 decision by 63 days.⁴

9 Granting Premera's motion and adopting its proposed Order will assure that the
10 Intervenor and the public both have every opportunity to review and provide their input
11 on any changes to the Form A that may be proposed. As the OIC Staff noted in
12 supporting that proposal:

13 The public's interest is best served by addressing as many issues as
14 possible prior to the actual hearing. By allowing time for discussions
15 between Premera and the OIC Staff and any resulting modifications to the
16 Form A, the Commissioner will be provided the benefit of narrowing of the
differences of opinion between Premera and OIC Staff and the best
information available upon which to base his decision.

OIC Staff Response to Premera's Motion to Extend Case Schedule, at 2.

17 CONCLUSION

18 The Intervenor's motion should be denied. There is no emergency. Two parties to
19 this proceeding have simply advised the Commissioner that they are interested in having
20 substantive discussions, which are in no way binding on the Commissioner. Premera's
21 motion asks the Commissioner to adjust the case schedule to permit such discussions.

22 That motion should be granted.

23 _____
24 ⁴ Premera's proposed Order provides for 67 days between the submission of any Form A
25 amendments (January 8, 2004) and the start of the adjudicative hearing (March 15, 2004).
There are 130 days between the former date and proposed new decision deadline of May
17, 2004.

Once the innuendo and political rhetoric are stripped away, the Intervenor's motion is revealed as an attempt to frustrate the current review of Premera's proposed conversion. Premera's motion is entirely consistent with the goal of having a transparent and thorough-going review process. Indeed, permitting the parties to develop the best information before the hearing will promote a focus on the issues that remain in dispute and will assure that the public has ample ability to review and comment upon those issues.

DATED this 8th day of December, 2003.

Respectfully submitted,

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